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10/075,088	02/16/2002	Graham Lindley Spruiell	IMA-0014-OXYPAK	7112
7590 02/24/2004 Edward L. Kelley 5 Utica Street Lexington, MA 02420			EXAMINER MENDOZA, MICHAEL G	
			ART UNIT 3761	PAPER NUMBER 12

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 12

Application Number: 10/075,088
Filing Date: February 16, 2002
Appellant(s): SPRUIELL, GRAHAM LINDLEY

G. L. Spruiell M.D.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 12/01/03.

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(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

The brief does not contain a statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief. Therefore, it is presumed that there are none. The Board, however, may exercise its discretion to require an explicit statement as to the existence of any related appeals and interferences.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 2-17, 19, 21, 22, and 25-34 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

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(9) Prior Art of Record

4,197,842	ANDERSON	4-1980
4,699,288	MOHAN	10-1987
6,292,687	LOWELL ET AL	9-2001
6,063,407	ZAPOL ET AL	5-200
6,141,589	DUHAYLONGSOD	10-2000
6,327,497	KIRCHGEORG ET AL	12-2001

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 5,7, and 14-16 are rejected under 35 U.S.C. 102(b). This rejection is set forth in prior Office Action, Paper No. 7.

Claims 2-4, 6, 8-13, 17, 19, 21, 22, and 25-34 are rejected under 35 U.S.C. 103(a). This rejection is set forth in prior Office Action, Paper No. 7.

(11) Response to Argument

The Appellant's primary argument is directed towards 35 U.S.C. 102(b) rejection using the primary reference US 4,197,842 to Anderson, in which the Appellant states the rejection is improper because the reference fails to teach each and every element set forth in claim 7.

As discussed in the previous Office action set forth in Paper No. 9, Anderson teaches an emergency medical kit, comprising a breathable oxygen delivery system and a medication. The limitation of the medication is for use in response to symptoms of an

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attack of vascular disease is functional language and is not given any patentable weight. The limitations must result in a structural difference. Therefore, the system of Anderson is fully capable of delivering the medication as described.

The Appellant also states that the kit is for use in a pre-hospital hospital setting. Any limitations in the preamble have not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Furthermore, because the kit is portable it can be used anywhere and in any situation including a pre-hospital setting. As to the limitations of the medications of claim 14, the limitation of the medication is for use in response to symptoms of an attack of vascular disease is functional language and is not given any patentable weight. The limitations must result in a structural difference. Therefore, the system of Anderson is fully capable of delivering the medication as described.

The Appellant's argument directed toward the combination of US 4,197,842 to Anderson and US 4,699,288 to Mohan, in which the Appellant argues that all the limitation are not taught in the prior art. However, Anderson does teach the structural limitations of a oxygen delivery system and a medication. The limitation of the medication is for use in response to symptoms of an attack of vascular disease is

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functional language and is not given any patentable weight. The limitations must result in a structural difference. Therefore, the system of Anderson is fully capable of delivering the medication as described. Anderson teaches the kit as claimed.

Anderson fails to specifically teach the materials of what a portable oxygen tank are made of. Mohan teaches a lightweight, durable vessel for holding a gas under pressure. Therefore it would have been obvious to one of ordinary skill in the art to use the vessel of Mohan for its properties of being lightweight and durable to enhance the portability of a portable kit using pressured gas.

With respect to claims 13, 17, 26, and 27, the Examiner provided the explanation in the preceding 35 U.S.C. 102(b). The 35 U.S.C. 102(b) stated that the claim limitations of an oxygen delivery system and a medication were met by the prior art reference to Anderson. As to the limitations that the medication is for use in response to symptoms of an attack of a vascular disease and that the vascular disease comprises a heart attack and a stroke, the limitations must result in a structural difference. Functional language is not given any patentable weight. Therefore, the system of Anderson is fully capable of delivering the medication as described. Furthermore, the system is capable of being used anytime during an emergency situation.

The Appellant's argument directed toward the combination of US 4,197,842 to Anderson and Lowell 6,292,687, in which the Appellant argues that all the limitations are not taught in the prior art. However, Anderson does teach the structural limitations of an oxygen delivery system, a medication, and a portable container/housing 9. The limitation of the medication is for use in response to symptoms of an attack of vascular

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disease is functional language and is not given any patentable weight. The limitations must result in a structural difference. Therefore, the system of Anderson is fully capable of delivering the medication as described. Anderson fails to teach one of a wireless communication device and a loud noise-making device. Lowell teaches a wireless communication device and a loud noise-making device for locating a user. Therefore it would have been obvious to include the devices of Lowell to notify an emergency work the user was in distress (col. 2, lines 62-64).

The Appellant's argument directed toward the combination of US 4,197,842 to Anderson and US 6,063,407 to Zapol et al., in which the Appellant argues that all the limitation are not taught in the prior art. However, Anderson does teach the structural limitations of a oxygen delivery system and a medication. The limitation of the medication is for use in response to symptoms of an attack of vascular disease is functional language and is not given any patentable weight. The limitations must result in a structural difference. Therefore, the system of Anderson is fully capable of delivering the medication as described including the medication of Zapol. With respect to the argument that that the oxygen used by Zapol is only for mixing medication, it is well known to use oxygen during vascular distress as disclosed in the Appellant's brief (see pg 10, lines 11-12). Therefore, it would have been obvious to one of ordinary skill in the art that the oxygen delivered by Zapol to a patient during treatment of thrombosis, etc. would help with the vascular problems.

The Appellant's argument directed toward the combination of US 4,197,842 to Anderson and US 6,141,589 to Duhaylongsod, in which the Appellant argues that all the

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limitation are not taught in the prior art. However, Anderson does teach the structural limitations of a oxygen delivery system and a medication. The limitation of the medication is for use in response to symptoms of an attack of vascular disease is functional language and is not given any patentable weight. The limitations must result in a structural difference. Therefore, the system of Anderson is fully capable of delivering the medication as described including the medication of Duhaylongsod. The medication of Duhaylongsod is used for controlling the heart (col. 5, lines 27-32). Furthermore, the Appellant recognizes that the use of the medications described by Duhaylongsod are well known in the art. Duhaylongsod also states that during a heart attack blood flow is reduced to the heart depriving the heart of oxygen (col. 1, lines 24-27). It is well known to use oxygen during vascular distress as disclosed in the Appellant's brief (see pg 10, lines 11-12). Therefore, would have been obvious to delivery oxygen to one that is suffering from heart distress.

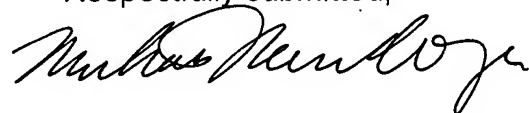
The Appellant's argument directed toward the combination of US 6,063,407 to Zapol and US 6,327,497 to Kirchgeorg et al., in which the Appellant argues that Zapol fails to teach the desirability to deliver oxygen to a user in vascular distress. It is well known to use oxygen during vascular distress as disclosed in the Appellant's brief (see pg 10, lines 11-12). Therefore, it would have been obvious to one of ordinary skill in the art that the oxygen delivered by Zapol to a patient during treatment of thrombosis, etc. would help with the vascular problems. Furthermore, it is known that the heart is deprived of oxygen during because of reduced blood flow during vascular distress. Therefore, it would have been obvious to one of ordinary skill in the art to supply oxygen.

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to one suffering from a heart attack or any other form of vascular distress to provide the heart with needed oxygen. With respect to predetermining a treatment and providing a portable emergency kit, the use of an inhaler requires that the user knows what the treatment is for. The treatment is then determined from what is ailing the user. An inhaler is portable and can be used in emergency situations. With respect to recognizing the symptoms of an attack, the user must know when to use the inhaler. A medical practitioner must instruct the user when and how to use the inhaler. With respect to the argument that that the oxygen used by Zapol is only for mixing medication, it is well known to use oxygen during vascular distress as disclosed in the Appellant's brief (see pg 10, lines 11-12). Therefore, it would have been obvious to one of ordinary skill in the art that the oxygen delivered by Zapol to a patient during treatment of thrombosis, etc. would help with the vascular problems.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Michael Mendoza
February 18, 2004

Conferees
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